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No. 88-1569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,
v.
MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation,
Appellee.

On Appeal from United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE NATIONAL ASSOCIATION OF REALTORS, AND THE AMERICAN INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT AND BACKGROUND	4
ARGUMENT	9
A. The Ban On Independent Expenditures As Applied In This Case Constitutes An Infringement Of Free Speech Which Is Entitled To The Highest Degree Of First Amendment Protection	9
B. This Court Consistently Has Invalidated Restraints On Independent Expenditures	11
C. The Ban On Independent Expenditures By Incorporated Membership Organizations Is Not A Narrowly Tailored Means To Advance A Compelling State Interest And, Accordingly, Is Unconstitutional	15
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — Page

Bread Political Action Comm. v. *FEC*, 635 F.2d 621 (7th Cir. 1980) 9
Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*
Cousins v. *Wigoda*, 419 U.S. 477 (1975) 9
Eastern R.R. Conf. v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 23
FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 10
FEC v. *Massachusetts Citizens for Life ("MCFL")*, 107 S. Ct. 616 (1986) ..... *passim*
FEC v. *Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480 (1985) ..... *passim*
FEC v. *Nat'l Right to Work Comm. ("NRWC")*, 459 U.S. 197 (1982) 14
First Nat'l Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 10, 11, 12
Harris v. *McRae*, 448 U.S. 297 (1980) 11
Kovacs v. *Cooper*, 336 U.S. 77 (1949) 24
Kusper v. *Pontikes*, 414 U.S. 51 (1973) 9
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 11
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 23
Mills v. *Alabama*, 384 U.S. 214 (1966) 9, 23
Mount Healthy City Board of Educ. v. *Doyle*, 429 U.S. 274 (1977) 11
NAACP v. *Alabama*, 357 U.S. 449 (1958) 10
NAACP v. *Button*, 371 U.S. 415 (1963) 9
Nat'l Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979) 3
Pipefitter Local No. 562 v. *United States*, 407 U.S. 385 (1972) 10
Roth v. *Robertson*, 64 Misc. 343, 118 N.Y.S. 351 (Sup. Ct. 1909) 26
Roth v. *United States*, 354 U.S. 476 (1957) 9
Shlensky v. *Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968) 26
Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 10
Williams v. *Rhodes*, 393 U.S. 23 (1968) 10, 11

TABLE OF AUTHORITIES—Continued

STATUTES — Page

2 U.S.C. § 431 6
2 U.S.C. § 431(9)(A)(i) 6
2 U.S.C. § 431(17) 7, 9
2 U.S.C. §§ 432-434 9
2 U.S.C. § 437g(a)(5)(A) 8
2 U.S.C. § 437g(a)(5)(B) 8
2 U.S.C. § 437g(d)(1)(A) 8
2 U.S.C. § 441a 7, 8
2 U.S.C. § 441b 10, 19
2 U.S.C. § 441b(a) 6
2 U.S.C. § 441b(b)(2)(C) 7
2 U.S.C. § 441b(b)(4)(A)(i), (4)(D) 8
26 U.S.C. § 501(c)(6) 3, 16
26 U.S.C. § 9002(9) 13
Revised Model Business Corp. Act §§ 8.30-8.31, 8.40-8.42 (1985) 25
ABA-ALI Model Bus. Corp. Act § 35 25
Cal. Corp. Code § 300 25
Del. Gen. Corp. Law § 141(a) 25
Mich. Comp. Laws Ann. ("MCL") § 169.201 (West 1989 Supp.) 5
MCL § 169.203(4) 5
MCL § 169.206(1), (2) 5
MCL § 169.206(3)(c) 5, 20
MCL § 169.209(1) 5
MCL §§ 169.224-226 6
MCL § 169.228 6
MCL § 169.231 6
MCL § 169.235 6
MCL § 169.251 6
MCL § 169.252 ..... 5, 6
MCL § 169.254(1) 5, 10
MCL § 169.255(1), (2), (3) 5, 6

REGULATIONS

Treas. Reg. § 1.501(c)(6)-1 3
11 C.F.R. § 104.3(b)(3)(vii) 21
11 C.F.R. § 109.1(b)(4) 7

TABLE OF AUTHORITIES—Continued

	Page
11 C.F.R. § 109.2	8, 21
11 C.F.R. § 114.7(j)	8
11 C.F.R. § 114.8(c), (d), (e) and (f)	8, 9
MISCELLANEOUS	
FEC Press Release (April 9, 1989)	20
H. Henn & G. Alexander, Laws of Corporations, 550 (1983)	25, 26
Lewis, *The Business Judgment Rule and Corporate Directors' Liability for Mismanagement*, 22 Baylor L. Rev. 157 (1970)	26
Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5508 (June 25, 1980)	8
Fed. Elec. Camp. Fin. (CCH) ¶ 5889 (April 6, 1987)	17
Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5775 (August 6, 1984)	7
Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5469 (March 12, 1980)	7
Mich. Dept. of State, Bureau of Elections, Manual for Indep. Political and Ballot Question Comm., 24	5
Op. No. 5344, Att'y Gen. of Mich. 549 (July 20, 1978)	6

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INTEREST OF AMICI CURIAE

The American Medical Association ("AMA") was established in 1847 to promote the art and science of medicine and the improvement of public health. The AMA is an incorporated not-for-profit professional association without stockholders. It has approximately 295,000 individual members, including practicing physicians, student members and physicians involved in teaching, research and related public health occupations. The AMA, which is supported primarily through the payment of dues by its members, engages in speech on a variety of public and

political issues of concern to the medical profession. The AMA has no corporate members, although some individual physicians pay their AMA dues through their professional corporations or have some or all of their dues paid by hospitals, medical clinics or other corporate employers.

The AMA has established the American Medical Political Action Committee ("AMPAC"), a separate segregated fund which in 1987-1988 had total receipts and expenditures of over $5 million. Of that amount, AMPAC spent $836,705 on independent expenditures.

The National Association of Realtors ("NAR") is an incorporated not-for-profit professional association established in 1908 to promote and advocate the highest degree of professional competence and integrity in the rendition of real estate services. The NAR is comprised of approximately 775,000 individual members engaged in all phases of the real estate business. None of the NAR's members are business corporations, although some individual members may have some or all of their dues paid by their corporate employers. The NAR engages in speech on a variety of public and political issues of concern to real estate professionals.

The NAR has established the Realtor's Political Action Committee ("RPAC"), a separate segregated fund which in 1987-1988 had total receipts and expenditures of approximately $6 million. Of that amount, RPAC spent $1,307,996 on independent expenditures.

The American Insurance Association, Inc. ("AIA") is an incorporated not-for-profit national trade association established in 1964 to promote and advocate the interests of property-casualty insurance companies. The AIA has 204 member companies which employ over 130,000 persons. It receives membership dues only from its corporate members and engages in speech on a variety of political and public policy issues on their behalf.

The AIA has established the American Insurance Association Political Action Committee ("AIA-PAC"), a separate segregated fund which in 1987-1988 had total receipts and expenditures of approximately $74,000. AIA-PAC did not make any independent expenditures during that time period.

The AMA, NAR and AIA (like the Michigan State Chamber of Commerce) are exempt from federal taxation under Section 501(c)(6) of the Internal Revenue Code. 26 U.S.C. § 501(c)(6). The Internal Revenue Service has adopted a regulation which defines a Section 501(c)(6) organization as

> an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit . . . . Thus, its activities should be directed to improvement of business conditions in one or more lines of business as distinguished from the performance of particular services for individual persons,

Treas. Reg. § 1.501(c)(6)-1; see *Nat'l Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 481-482 (1979). Consistent with this regulation, the purpose of AMA, NAR and AIA is to promote the interests of their members and not to engage in any regular business for profit, although AMA and NAR earn some income through certain unrelated business activities consistent with the interests of their members and the Internal Revenue Code.[1] Their primary activities include professional education, collection of information, research, analysis, and advocacy of political and policy ideas and programs that advance the common interests of their

[1] For example, the AMA publishes a variety of medical and scientific journals for its members and the medical and scientific community, and it earns income from the sale of advertising in these journals. The NAR engages in similar activities. The AIA does not earn any unrelated business income.

members. Because the conduct of *amici* directly is affected in many ways by regulations similar or identical to the Michigan Act at issue in this case and *amici* have significant experience with campaign funding regulations, *amici* are filing this brief to present their views on these issues to the Court.[2]

At issue in this case is the constitutionality of a Michigan statute which limits the ability of all corporations, including not-for-profit, incorporated associations and advocacy groups, to engage in political speech through "independent expenditures." *Amici* engage in independent expenditure activities related to candidates for federal office, but are constrained in doing so by provisions of the FECA which are substantially identical to those of the Michigan statute. Thus *amici* seek affirmance of the decision below in order to more clearly establish the constitutional dimensions of their First Amendment freedom to engage in such political speech.

Amici assert that this result is warranted because, while the Michigan statute at issue directly infringes protected speech and associational rights, it is not narrowly tailored to achieve a compelling state interest. In particular, the statute's broad and indiscriminate application to all corporations, including those such as *amici*, is unrelated to whatever legitimate objectives may be served by limitations on campaign contributions by business corporations.

STATEMENT AND BACKGROUND

1. At issue in this case is the constitutionality of statutory limits on the ability of not-for-profit, incorporated associations and advocacy groups to engage in political

[2] *Amici* have obtained consent to the filing of this brief from all parties. Copies of the parties' letters of consent have been filed with the Clerk of the Court.

speech through "independent expenditures." The statute at issue, the Michigan Campaign Finance Act ("Act"), 1976 Mich. Pub. Acts 388, Mich. Comp. Laws Ann. ("MCL") § 169.201, *et seq.* (West 1989 Supp.), prohibits "a corporation" from making any "expenditure" in connection with an election campaign for state office. MCL § 169.254(1). An "expenditure" includes any "payment" or other contribution of goods, services or facilities in "assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." MCL § 169.206(1).[3] The limitation on corporate expenditures also prohibits any payment or transfer of "anything of ascertainable monetary value for purposes of influencing the nomination or election of any candidate or the qualification, passage or defeat of a ballot question." MCL § 169.206(2). Thus, a corporate expenditure made for the purpose of communicating on issues of public policy is permissible only if it does not support or oppose a candidate or ballot issue by name or by "inference." MCL § 169.206(3)(c).

The Act permits the use of corporate funds for the "establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." MCL § 169.255(1). Such "separate segregated funds" ("political action committees" or "PACs") are limited in the amount that they may contribute to a candidate (MCL § 169.252), unless the expenditures are "independent." Mich. Dept. of State, Bureau of Elections, Manual for Independent Political and Ballot Question Committees, 24. An "expenditure" is "independent" if it is "not made at the direction of, or under the control of, another person" and if it is not made to a "committee." MCL §§ 169.209(1); 169.203(4).

[3] Corporations also are prohibited from making any "contribution" to a candidate for office or a candidate's campaign committee. MCL § 169.254(1). A "contribution" consists of any payment, pledge, gift or promise to pay anything of value to any "person" "for the purpose of influencing" an election. MCL § 169.254(1).

Contributions to Michigan political action committees may be solicited only from individual members, stockholders, officers, directors and executive and administrative employees of the corporation that establishes the PAC. MCL § 169.255(2) & (3).[4] Political action committees also must register with the Michigan Department of State either as an "independent committee" or a "political committee." The dollar amount of the contributions made by Michigan PACs is limited based on this registration. MCL § 169.252. In addition, such committees are subject to detailed recordkeeping and reporting requirements. See, *e.g.*, MCL §§ 169.224-226, 169.228, 169.231, 169.235.[5]

2. The Federal Election Campaign Act ("Federal Act" or "FECA") of 1971 (2 U.S.C. §§ 431 *et seq.*) is similar in many respects to the Michigan statute. The Federal Act makes it unlawful for any "corporation . . . , or any labor organization, to make a contribution or expenditure in connection with" any federal election. 2 U.S.C. § 441b (a). The definition of "expenditure" includes the provision of anything of value "for the purpose of influencing any election for Federal office" (2 U.S.C. § 431(9)(A)(i)), but excludes the contribution of money or services for the "establishment, administration, and solicitation

[4] The PAC at issue in this case—the Michigan State Chamber Political Action Committee—may *not* solicit funds from the PACs of the corporations that are members of the Chamber of Commerce. Op. No. 5344, Att'y Gen. of Mich. 549 (July 20, 1978). It may solicit contributions from individual members, executives and administrative employees of the Chamber of Commerce, and from the executive and administrative employees of its member companies. MCL § 169.255(2) and (3).

[5] Under the Michigan Act, *any* "person, other than a committee, who makes an independent expenditure . . . which totals an amount of $100.01 or more in a calendar year shall file a report of the independent expenditure . . . ." MCL, § 169.251. Committees, which are exempted from this provision, are subject to separate reporting requirements.

of contributions to a separate segregated fund [*i.e.*, PAC] to be utilized for political purposes." 2 U.S.C. § 441b (b)(2)(C). Federal PACs—like their Michigan counterparts—are subject to strict limits on the amount of contributions (but not independent expenditures) that they may make. 2 U.S.C. § 441a. See *Buckley* v. *Valeo*, 424 U.S. 1, 39-59 (1976) (invalidating the limits on independent expenditures).

An " 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17). The paid advertisement at issue in this case would be an "independent expenditure" if made about a candidate for Federal office. Independent expenditures must be made "without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate," and they may not be made "in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); see 11 C.F.R. § 109.1(b)(4).

The regulations and advisory opinions issued by the Federal Election Commission ("FEC") pursuant to FECA narrowly construe the definition of "independent expenditure." For example, virtually any consultation with a candidate or his staff may result in a subsequent expenditure being deemed to be not "independent." FEC Advisory Opinion 1984-30, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5775 (August 6, 1984). In many circumstances, a PAC's employment of a consultant or vendor (*e.g.*, an advertising or public relations agency) in connection with an expenditure advocating the election or defeat of a clearly identified candidate may give rise to a presumption that the expenditure is not "independent" if that consultant or vendor has worked for the candidate or the political party with which the candidate is affiliated. See FEC Advisory Opinion 1979-80, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5469 (March 12, 1980).

"Every person" who makes independent expenditures in excess of $250 in a calendar year is subject to the reporting requirements of the Federal Act. 11 C.F.R. § 109.2.[6]

An expenditure that is not "independent" will be counted as an "in-kind contribution" subject to the contribution limits of FECA. 2 U.S.C. § 441a. These contribution limits are more strict than Michigan's limits—generally $1000 or $5000 per election. Expenditures which exceed such limits, but do not meet the definition of independent expenditure, are subject to significant civil penalties. 2 U.S.C. § 437g(a)(5)(A). Knowing and willful violations may result in a doubling of the civil penalty or the imposition of criminal penalties. 2 U.S.C. § 437g(a)(5)(B); 2 U.S.C. § 437g(d)(1)(A).

Federal PACs of incorporated associations, like their counterparts under Michigan law, may solicit contributions from the association's executive and administrative employees and their non-corporate members. 2 U.S.C. § 441b(b)(4)(A)(i), (4)(D). The PACs of corporate members of an association may not be solicited (11 C.F.R. § 114.7(j)), but the executive or administrative employees of member corporations may be solicited if the association complies with detailed regulatory requirements. 11 C.F.R. § 114.8(c), (d), (e) and (f).

[6] The FEC also has held that an "expenditure" for a mass mailing advocating the election of a candidate, in which the committee would receive individual contributions in response to the mailing and pass them along to the candidate, would not be counted as an independent expenditure but would count as an in-kind "contribution." According to the FEC, because the committee would "gather[] and transmit[]" the checks to the candidate, "the acceptance of the checks by the candidate constitutes acceptance of the costs incurred by [the committee] in connection with the solicitation" and those costs must be counted as an in-kind contribution. See FEC Advisory Opinion AO 1980-46, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5508, at 10,589 (June 25, 1980).

In particular, the association PAC must receive written "separate and specific approval" from each member corporation each year before it may solicit the employees of that member. 11 C.F.R. § 114.8(c). A member may provide such permission only to one association per year. If permission is granted, the association PAC may solicit only the employees of the corporate entity which is a member—not the employees of affiliate and subsidiary corporations. 11 C.F.R. § 114.8(f).[7] Finally, Federal PACs, like their Michigan counterparts, are subject to detailed organizational, record-keeping and reporting requirements. 2 U.S.C. §§ 432-434; see *FEC* v. *Massachusetts Citizens for Life* ("MCFL"), 107 S.Ct. 616, 625-626 (1986).

ARGUMENT

A. The Ban On Independent Expenditures As Applied In This Case Constitutes An Infringement Of Free Speech Which Is Entitled To The Highest Degree Of First Amendment Protection

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). Thus, the "First Amendment affords the broadest protection to such political expression." *Id.*; see *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The First Amendment also guarantees "freedom to associate with others for the common advancement of political beliefs and ideas." *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975) (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 56 (1973)); see *NAACP* v. *Button*, 371 U.S. 415 (1963).

[7] Permission generally is difficult to obtain and some associations have suffered a decline in contributions since 1976 when this provision was enacted. See *Bread Political Action Comm.* v. *FEC*, 635 F.2d 621, 637 (7th Cir. 1980) (Pell, J. dissenting).

Restrictions on independent expenditures in support of, or opposed to, particular candidates or ballot issues "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (1976) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)); see *FEC* v. *Massachusetts Citizens for Life ("MCFL")*, 107 S.Ct. 616, 624 (1986); *FEC* v. *Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 493 (1985) (independent expenditures "produce speech at the core of the First Amendment"). The "primary effect" of independent expenditure limitations is "to restrict the quantity of campaign speech" by the persons subject to the limitations. *Buckley*, 424 U.S. at 39.[8] Such limitations also "impinge on protected associational freedoms" (*Buckley*, 424 U.S. at 22), particularly where the organization is formed, at least in part, for the specific purpose of advocating its members' views on issues of public importance.[9]

Section 54(1) of the Michigan Campaign Finance Act (MCL § 169.254(1)) flatly prohibits any independent ex-

[8] Because the knowledge of which candidates are supported by a particular organization can be important to voters, restrictions on independent expenditures also infringe upon "the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); see also *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).

[9] The "original basis" for recognizing the protection of associational rights was to protect the ability of individuals to effectively band together to "amplif[y] the voice of their adherents." *Buckley*, 424 U.S. at 22 (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). A restriction on the rights of an association to advocate its political views is "simultaneously an interference with the freedom of [its] adherents." *Buckley*, 424 U.S. at 22 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)). Congress recognized the importance of these associational rights and sought to protect them when it adopted the statute regulating corporate political contributions. 2 U.S.C. § 441b; *Pipefitter Local No. 562* v. *United States*, 407 U.S. 385, 431 n.42 (1972).

penditure by a corporation (*supra*, 5) and constitutes a direct infringement of protected speech and associational rights. J.S. App. 9-10. The State does not dispute that the Act results in such an infringement (see Juris. Stmt. 13) and, in fact, the ban on expenditures imposed in this case has a substantial impact on the speech of the appellee and similarly situated parties. See *MCFL*, 107 S.Ct. at 626, 629.

B. This Court Consistently Has Invalidated Restraints On Independent Expenditures

Where, as here, a statutory provision directly and substantially burdens fundamental constitutional rights—such as the First Amendment rights of speech and association—the statutory provision is "presumptively unconstitutional." *Harris* v. *McRae*, 448 U.S. 297, 312 (1980); *Mount Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274 (1977). In order to uphold the ban on independent expenditures, the state bears the burden of demonstrating that the statute, as applied, is (1) necessary to achieve a compelling state interest, *Williams* v. *Rhodes*, 393 U.S. at 31; *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841-42 (1978); *Bellotti*, 435 U.S. 765, 786; and (2) narrowly tailored to serve that interest, *id.* at 793-95; *Landmark*, 435 U.S. at 841-42. This Court's prior decisions applying these First Amendment standards to legislative attempts to restrict independent expenditures have consistently held that such restrictions were unconstitutional.

Moreover, application by this Court of the compelling state interest analysis in the context of campaign finance regulation has turned on the fundamental distinction between limitations on independent expenditures and limitations on contributions to a candidate. See *Buckley*, 424 U.S. at 23-38. Indeed, the Court expressly has stated that a restriction on independent expenditure requires a more

compelling justification than a restriction on campaign contributions. See *MCFL*, 107 S.Ct. at 629; *Buckley*, 424 U.S. at 20-22.

In upholding the contribution limits of the Federal Election Campaign Act in *Buckley*, this Court emphasized that restrictions on contributions serve the primary purpose of "limit[ing] the actuality and appearance of corruption" resulting from large direct contributions to candidates. *Id.* at 26. The limit on contributions "focuses *precisely* on the problem of large campaign contributions —the narrow aspect of political association where the actuality and potential for corruption have been identified —while leaving persons free to engage in independent political expression . . . ." *Id.* at 28 (emphasis added).

By contrast, the Court has been reluctant to uphold state limitations on independent expenditures, on the ground that such limitations are less precisely focused on the identified problem of actual and potential corruption. Thus, the Court has invalidated a ban on independent corporate expenditures for speech related to ballot referendum issues. *Bellotti*, 435 U.S. 765. Similarly, in *Buckley*, the Court found that the "government interest in preventing corruption and the appearance of corruption" was "inadequate to justify [FECA's] ceiling on independent expenditures" by individuals and groups. *Buckley*, 424 U.S. at 45.[10] The Court also rejected the notion that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy . . . imposed by [FECA's] expenditure ceiling." *Id.* at 48.

More recently, in *NCPAC*, 470 U.S. 480 (1985), the Court struck down provisions of the Presidential Election Campaign Fund Act ("Fund Act") which made

[10] This "most drastic" limitation restricted individuals and groups to an expenditure of $1000 per year to advocate the election or defeat of "a clearly identified candidate." *Id.* at 41.

it a criminal offense for any "political committee" [11] to make independent expenditures in excess of $1000 in support of any candidate who has accepted public funding. 470 U.S. at 491.[12] The Court held that, for reasons analogous to those stated in *Buckley*, the expenditure limitation was "constitutionally infirm" because there is "no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or give the appearance of corruption." 470 U.S. at 497. Corruption and the appearance of corruption "are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Id.* at 496-497.

The Court in *NCPAC* emphasized that the "hallmark of corruption is the financial *quid pro quo*: dollars for political favors." 470 U.S. at 497. Because "the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate,"

> the absence of prearrangement and coordination undermines the value of the expenditure to the candi-

[11] The term "political committee" is broadly defined in the Act to include "any committee, association, or organization (whether or not incorporated) which . . . makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." *NCPAC*, 470 U.S. at 491-92 (quoting 26 U.S.C. § 9002(9)).

[12] The Court concluded that such independent expenditures constitute protected speech "at the core of the First Amendment" and that the Act infringed the right to engage in such speech. According to the Court, "allowing the presentation of views while forbidding the expenditure of more than $1000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 493. The Court also specifically "reject[ed] the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection." *Id.* at 494.

> date, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 498. Thus, it is clear that the form of the restriction—*i.e.*, a limit on independent expenditures rather than on contributions—was central to the Court's analysis in *NCPAC*.

The Court in *NCPAC* also distinguished its decision in *FEC* v. *Nat'l Right to Work Comm.* (*"NRWC"*), 459 U.S. 197 (1982), which had upheld a FECA provision that permitted the use of corporate funds to solicit contributions to the corporation's PAC, but limited such solicitations to "stockholders or members of a corporation without capital stock." *NCPAC*, 470 U.S. at 495. This restriction had been upheld "in view of the well established constitutional validity of legislative regulation of corporate contributions for public office." *Id.* at 495. The Court also noted that *NRWC* is consistent with this Court's earlier holding that a corporation's expenditures to propagate [corporate] views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." *Id.* at 495-496.

Most recently, in *MCFL*, a majority of the Court held that the FECA's prohibition on corporate independent expenditures could not constitutionally be applied to the expenditures of a not-for-profit, non-stock corporation. In applying the compelling state interest analysis, the Court began by emphasizing that, although MCFL had adopted a corporate form, it essentially was an advocacy group or special-interest group, "formed to disseminate political ideas, not to amass capital." *Id.* at 628. Thus, MCFL did not present the risks previously recognized in the context of business corporations: "[t]he resources [MCFL] has available are not a function of its success

in the economic marketplace, but its popularity in the political marketplace." *Id.* at 628.[13]

The Court rejected the argument that allowing such contributions by non-profit "interest group" corporations "would open the door to massive undisclosed political spending." *Id.* at 630. The "reporting obligations" under the Act would provide the "information necessary to monitor MCFL's independent spending activity and its receipt of contributions." *Id.* Thus, the state's interest in "disclosure" can be met "in a manner less restrictive" than a ban on MCFL's independent expenditures. In sum, the Court concluded that the "desire for a bright-line rule" (*i.e.*, a rule which strictly limited expenditures by all "corporations"), "hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *Id.* at 630.

C. The Ban On Independent Expenditures By Incorporated Membership Organizations Is Not A Narrowly Tailored Means To Advance A Compelling State Interest And, Accordingly, Is Unconstitutional

In this case, the Michigan State Chamber of Commerce and *amici curiae* share most of the relevant characteristics of the "advocacy group" or "interest group" corporation addressed in *MCFL*. Each engages primarily in political and public policy advocacy on behalf of its members and does not engage in business for a profit. See

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[13] The Court again distinguished *NRWC* as a case involving "contributions"—and thereby appropriately addressed by a "broad prophylactic rule"—rather than a case involving independent expenditures, which only may be limited by "more precis[e]" regulation. *MCFL*, 107 S.Ct. at 629 ("the desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of independent spending"); *MCFL*, 107 S. Ct. at 629 ("We have consistently held that the restrictions on contributions require less compelling justification than restrictions on independent spending.").

Motion to Affirm, 7; *MCFL*, 107 S.Ct. at 631. Each is supported primarily by the dues of its members and has no shareholders or other persons who would have a claim on its "earnings." See Motion to Affirm, 4; *MCFL*, 107 S. Ct. at 631.[14]

However, the Chamber (and at least one *amici*—AIA) is factually distinguishable from MCFL on a single ground, which appellants claim to be determinative. In reiterating the "features" of a protected advocacy group essential to its holding in *MCFL*, this Court stated that "MCFL was not established by a business corporation . . . and it is its policy not to accept contributions from such entities." *MCFL*, 107 S. Ct. 631. The Court did not, however, hold that these facts were important to the constitutional analysis for their own sake, but rather because they demonstrated that MCFL was not "serving as [a] conduit[] for the type of direct spending that creates a threat to the political marketplace."

Appellants' primary argument is that, because many of the Chamber's members are business corporations, and the Chamber therefore does not follow the same policy as MCFL did, the statute as applied to the Chamber must be constitutional.[15] But, the absence, by itself, of one portion of one feature identified in the *MCFL* opinion cannot substitute for a careful analysis of whether the relationship between the interests asserted and the means employed by the State of Michigan to serve those

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[14] Section 501(c)(6) organizations may not be "organized for profit" and "no part of the net earnings" of such an organization may "inure[] to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6).

[15] Appellant's argument appears to *assume* that the First Amendment does not preclude an absolute ban on corporate expenditures. However, this Court never has addressed the question "whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *NCPAC*, 470 U.S. at 496.

interests are sufficient to justify the significant infringement of appellee's First Amendment rights. Because it is clear that Michigan's attempt to ban independent expenditures in this case is flawed in precisely the same ways that the statute in *MCFL* was, the decision below should be affirmed.[16] In any case, appellants' argument fails to justify a statutory ban on independent expenditures by many incorporated associations, such as *amici* AMA and NAR, whose members are individuals not corporations.

Appellants point to several compelling state interests that they claim are served by the ban on appellee's independent expenditures. First, appellants argue that the state has a compelling interest in preventing corporate "corruption" of the political process by outlawing expenditures derived from "political 'war chests' which could be used to incur political debts from legislators." App. Br., at 28-29. Second, appellants suggest that such independent expenditures must be banned to ensure that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form" are not used to dominate or overwhelm competing voices in the marketplace of political speech. App. Br. 42. Finally, appellants argue that limitations on independent expenditures serve the "compelling" interest of protecting third parties who might pay money into a corporate treasury (*i.e.*, shareholders or customers) from having their "money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208. No interest identified by appellants is sufficient to support an absolute ban on independent expenditures by the

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[16] Like the State of Michigan, the Federal Election Commission has adopted the position that a single dollar of corporate money is sufficiently "corrupting" to preclude independent expenditures by an advocacy group or association that receives such funding. See Advisory Opinion 1987-7, Fed. Elec. Camp. Fin. (CCH), ¶ 5889 (April 6, 1987).

Chamber of Commerce or by other similar associations and advocacy groups.

1. Appellants first articulated interest—in preventing corporate "corruption" of the political process by outlawing expenditures "which could be used to incur political debts from legislators" (App. Br. 28-29)—does not support the ban on expenditures in this case. A generalized interest in preventing corporate "corruption" has been held by this Court not to be a compelling one in the context of independent expenditures. See *NCPAC*, 470 U.S. at 497. "Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." *MCFL*, 107 S.Ct. at 630.

The Court recognized in *Buckley* that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. Thus, not only are independent expenditures of considerably less value (and thus, less likely to corrupt) than contributions, but the "absence of prearrangement and coordination" with the candidate "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*

The fact that some associations may be larger in size and (at least potentially) able to make larger expenditures than the organization at issue in MCFL does not automatically increase the state's interest.[17] As the Court noted in *NCPAC*, the fact that a particular type of or-

[17] It is simply not the case that associations whose members are business corporations are more likely to have greater resources for political expenditures than associations of individuals. It is the size of an association's membership (*and* the power of its ideas that attracts members to voluntary associations) which determines its political resources. Thus, the AMA and NAR, which each have many hundreds of thousands of *non-corporate* members, have far larger PAC resources than either the AIA or the Michigan State Chamber of Commerce, which have many corporate members.

ganization may be able to "spend larger amounts" than other organizations does not necessarily mean that the "potential for corruption is greater." 470 U.S. at 497-498. As long as "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more," the threat of corruption is nonexistent, regardless of the size or amount of the "uncoordinated expenditures" at issue. *Id.* at 498.[18]

Even if there were a real threat of corruption from the independent expenditures at issue here, the Michigan statute is far from a narrowly tailored response to the problem that the First Amendment demands. As the Court noted in analyzing a parallel federal statute in *MCFL*, a "broad prophylactic rule" was appropriate in regulating contributions only because of the "historical role of contributions in the corruption of the electoral process." 107 S. Ct. at 629. Here, there is no historical or contemporary evidence that independent expenditures are inherently corrupting, and therefore there is no justification for a broad prophylactic rule in this area. See *id.* (regardless of the abstract "desirability of a broad prophylactic rule," a regulation that infringes political speech "demands far more precision than § 441b provides").

The Michigan statute lacks constitutionally-required precision in responding to the state's interest in preventing corruption in several respects. For example, the statute is vague in the scope of its restrictions. It excludes an "expenditure for communication" from its reach only if the communication does not support or

[18] As in *NCPAC*, the argument that allowing independent expenditures by associations and other advocacy groups runs a substantial risk of corruption or the appearance of corruption is based on nothing more than the unsupported assertions of the State. Appellants brief fails to identify even a single instance of the use of an independent expenditure in a manner that gives rise to corruption or the threat of corruption.

oppose a candidate "by name or clear *inference*." MCL § 169.206(3)(c). A statute that can result in the imposition of significant civil or criminal penalties based on the "inference" that might be drawn by a public official from protected political speech hardly constitutes the kind of precise regulation that the First Amendment demands. In addition, the Michigan statute is overbroad. *Amici* AMA and NAR are associations of individual members and, under any reasonable analysis of the state's interest, they should be permitted to engage in independent expenditures under the Act. Yet, the Michigan statute would deny AMA and NAR the right to make independent expenditures merely because they are incorporated. The touchstone of narrowly tailored state regulation is substance over form, but the Michigan Act utterly fails that standard.

Most important, any threat of "corruption" that might result from independent expenditures can be more narrowly, and more appropriately, addressed by other regulatory requirements. For example, regulations could be adopted strictly proscribing any contact between the person making an "independent" expenditure and the candidate or his political committee, such as those imposed under FECA. See *supra*, 7. By imposing such regulatory restrictions, the FECA precludes the use of independent expenditures to evade the limits on contributions and the concomitant risk of corruption or the appearance of corruption.[19]

The risk of corruption also is more narrowly addressed by the reporting requirements already in place. The

[19] At least in part because of the rigorous federal regulations, independent expenditures for the 1987-1988 election cycle amounted to only about $21 million, about $1 million of which was expended by individuals. During the same period, federal PACs made a total of over $349,000,000 in expenditures, of which over $159 million constituted direct contributions to federal candidates. See FEC Press Release (April 9, 1989).

FEC, for example, requires reporting by Federal PACs of all disbursements in excess of $200 per calendar year "in connection with an independent expenditure." 11 C.F.R. § 104.3(b)(3)(vii). In addition, "[e]very person . . . who makes independent expenditures aggregating in excess of $250 during a calendar year" is required to file a detailed disclosure statement. 11 C.F.R. § 109.2. Contrary to the assertion of Appellants any "person" (including incorporated entities) who makes an independent expenditure under Michigan law is required to report to the Secretary of State. *Supra*, 6 n.5. Application of such disclosure requirements to the Chamber would foreclose the kind of corruption—*i.e.*, the political *quid pro quo*—that is the focus of the State's concern, without foreclosing protected political speech.

2. Appellants' interest in preventing *corporate* dollars from being used to make independent expenditures also is not a compelling state interest, at least when applied to an incorporated trade association. Although the Court has suggested that organizations "that amass great wealth in the economic marketplace" should be precluded from gaining "unfair advantage in the political marketplace" (*MCFL*, 107 S.Ct. at 631) that argument—even if valid—should not apply to incorporated trade associations, regardless of their membership.

a. Trade associations do not themselves compete in the economic marketplace. To the contrary, if an association is successful in obtaining substantial funding, its success is likely attributable to its ability to attract and keep large numbers of members rather than to its success in the economic market place. Sucessful fund-raising in the trade association context is more akin to success in the political marketplace because it depends on the voluntary decisions of each member and the attractiveness of the association's ideas and agenda. *Cf. Buckley*, 424 U.S. at 21; *MCFL*, 107 S.Ct. at 628 ("[r]elative availability of

funds is after all a rough barometer of public support").

Appellant's argument is based, at least in part, on the assumption that the "wealth" of the Michigan State Chamber of Commerce PAC reflects the "corporate" status of its members. In fact, the Chamber PAC's strength results primarily from the size of its membership—about 8,000 companies and individuals—and not from the form of organization or the wealth of some of these members. Associations with fewer members find it more difficult to raise funds to engage in political speech because of the comprehensive regulatory scheme under which they must operate. See *supra*, 8. The effect of these regulations is the same whether the associations' members are individuals, small companies, or major corporations.[20]

Appellants also argue that when an association has corporate members, it may serve as a conduit "for the type of direct spending that creates a threat to the political marketplace." Brief for Appellants, at 39-40 (quoting *MCFL*, *supra* at 631). The conduit argument, however, is based on the false premise that the association is a passive servant of its membership and that its members share an identity of interest. This is not realistic in an organization such as the Michigan Chamber of Commerce, which has 8,000 members engaged in diverse businesses. Moreover, trade associations often are deeply divided on issues because members of the same industry have different economic interests. While the conduit argument might possibly have some force for associations with few members in particularly unified industries, this hardly justifies a statutory prohibition that applies to all incorporated associations regardless of the number of members.[21]

[20] AIA-PAC is far smaller than AMPAC or RPAC because of its relatively small number of members, despite the fact that many of AIA-PAC's members are large, successful insurance corporations. Nevertheless, AMPAC and RPAC received six to eight times the funds received by AIA-PAC in 1987-1988 because they have a much larger pool of members to solicit. Moreover, AIA-PAC must obtain the written prior approval of each of its members before it may solicit the employees of that member. Because AIA-PAC may not solicit directly the PACS of its corporate members or their PACS (*supra*, 8), the absolute ban on political speech by the AIA itself gives rise to a significant burden. This pattern, in which the limitation on association PAC solicitation combines with the prohibition on associational expenditures to restrict speech severely, is a common result of existing campaign finance regulation in Michigan and in federal elections.

b. More fundamentally, the suggestion that the state has a compelling interest in banning corporate (or corporate-affiliated) speech because the "quantity" of such speech is likely to be excessive or "too effective" is flatly contrary to basic First Amendment principles. See, *e.g.*, *Buckley*, 424 U.S. at 16-18. At bottom, this amounts to nothing more than a direct restriction on speech *qua* speech, a rationale which never has been sanctioned by this Court. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Mills* v. *Alabama*, 384 U.S. 214 (1966).

This Court already has stated that the "First Amendment's protection against governmental abridgement of free expression cannot be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 49; see *Eastern R.R. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Thus, this Court in *Buckley* rejected the argument that limits

[21] Moreover, the risk that a trade association would serve as a "conduit" for corporate funding can be addressed readily by disclosure and other regulations that allow examination of (1) the source, volume and distribution of funding; (2) the "control" and management of association speech; and (3) the legitimacy of the association's independence from its members. As long as an association is not a "sham," the risks that it will serve as a conduit for corporate funding are misplaced.

on independent expenditures would be upheld based on the government interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections . . . ." *Id.* at 48. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Id.* 48-49.[22] If the First Amendment's protection of the free marketplace of ideas has any meaning, it must prohibit the government from restricting the speech of certain speakers for no other reason than to enhance the voice of their competitors. Thus, even if the appellants correctly believe that limits on associational expenditures are a necessary means to their end of limiting "corporate" expenditures, their ultimate end—a ban on corporate expenditures—is not consistent with the First Amendment.

3. Appellant's final articulated "interest" is "to protect shareholders" who have paid money into a corporation from having that money used "to support political candidates to whom they may be opposed." Brief of Appellants, at 35. In essence, this argument suggests that the prohibition on "corporate" independent expenditures is necessary to prevent the officers and directors of a corporation from "improperly" using corporate assets to support associations or trade groups that, in turn, make independent expenditures relating to candidates that the shareholders do not support. This is, however, no basis for a flat ban on an incorporated trade association's protected speech.

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[22] The Court in *Buckley* rejected the analogy that the "volume" of some political speech—like the decibels emitted by a sound truck (*Kovacs* v. *Cooper*, 336 U.S. 77 (1949))—could be regulated as a legitimate time, place and manner restriction. *Buckley*, 424 U.S. at 18 n.17.

The incorporated associations to which the statute applies have no shareholders that require government protection. The association's members, corporate and otherwise, are fully capable of resigning if they disagree with the association's use of their funds. Association members have "no economic disincentive for disassociating with [an association] if they disagree with its political activity." *MCFL*, 107 S. Ct. at 631. Moreover, to the extent that shareholders disagree with their corporation's membership in a trade association, the longstanding common law and statutory rules of corporate governance provide them with ample authority to protect their own interests.

The traditional test of whether a business corporation is "properly" spending money has never depended on the consent of the individual shareholders. H. Henn & G. Alexander, Laws of Corporations, 550 (1983).[23] Where such spending decisions are *not* in the best interests of the corporation, the common law provides the shareholder with a remedy. It is a familiar principle that the officers and directors of a corporation have a duty of loyalty and duty of due care in their dealings with regard to the corporation, including a duty not to waste the assets of the corporation. Revised Model Business Corp. Act §§ 8.30-8.31, 8.40-8.42 (1985); Laws of Corporations, *supra*, at 611-663. If such "waste" occurs, the officers and directors are individually liable to

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[23] Under the common law, consent of the shareholders is not necessary when the corporation, through its directors or officers, decides to make an expenditure—even if, for example, that expenditure relates to the services of a law firm or lobbyist to work in favor of particular legislation. See, *e.g.*, ABA-ALI Model Bus. Corp. Act § 35 (all corporate powers vested in board of directors); Cal. Corp. Code § 300; Del. Gen. Corp. Law § 141(a). The officers and directors of the corporation historically have been permitted to make decisions on the best use of corporate assets—in accordance with the best interests of the corporation—even if the majority of the shareholders *personally* might disfavor the legislation that the corporation has decided to support.

the corporation (and its shareholders) for their misuse of corporate funds. Laws of Corporations, *supra* at 622-623.[24]

Finally, even if the state could deem it an injury to permit corporations to engage (through trade associations) in independent expenditures in which their shareholders individually and personally may disagree, such concerns—like concerns with "corruption"—readily may be responded to in a more narrowly tailored fashion. See *supra* 21-22. Indeed, such concerns may be directly and completely addressed through requiring corporations that contribute to trade associations engaged in independent expenditures to provide their shareholders (and the public) with full disclosure of such activities.

Such an approach would permit individual shareholders (and customers) to determine whether or not the expenditure was "appropriate," without curtailing the speech of the corporation and those stockholders and customers who support its position. If a shareholder, disagrees with a corporation's (or its association's) political position, he can act accordingly and sell his stock. Indeed, if the expenditure—whether made directly or through an association—constitutes "waste," a shareholder could bring suit. A customer who disagreed with corporate speech can take his business elsewhere. Such an approach would be more consistent with our constitutional commitment to a "marketplace of ideas" than the Michigan Act, which simply prohibits associational speech on the ground that some individuals indirectly affiliated with the association might dissent from the association's position.

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[24] See "The Business Judgment Rule and Corporate Directors' Liability for Mismanagement," 22 Baylor L. Rev. 157 (1970); *Roth* v. *Robertson*, 118 N.Y.S. 351 (Sup. Ct. 1909) (director liable for "waste and misapplication of corporate funds"); *Shlensky* v. *Wrigley*, 95 Ill.App.2d 173, 237 N.E.2d 776 (1968).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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